

Decision 02-03-026

March 6, 2002

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

Order Instituting Rulemaking into
Implementation of Assembly Bill 1149
Regarding Underground Electric and
Communication Facilities.

R.00-01-005
(Filed January 6, 2000)

ORDER DENYING REHEARING OF INTERIM DECISION (D.) 01-12-009

I. SUMMARY

By this decision, we deny the application for the rehearing of D.01-12-009 filed by the City of Oakland, which seeks an expansion of the Rule 20A definition of “public interest,” such that Rule 20A funds would be made available for areas of fire hazard and earthquake.

II. FACTS/ PROCEDURAL BACKGROUND

On January 6, 2000, the Commission issued an Order Institution Rulemaking (OIR), R.00-01-005, to implement Assembly Bill (AB) 1149 (Aroner, Stats. 1999, Ch. 844). The bill requires the Commission to study ways to amend, revise, and improve the rules for the conversion of existing overhead electric and communications lines to underground service and to submit a report to the Legislature by January 1, 2001. The Commission has not yet submitted the report; however, Assigned Commissioner Duque submitted a letter to each legislator with his recommendations and a summary of the study results.

The Energy Division convened workshops, after which participants submitted comments on which issues the Commission should include in its report to the Legislature. Concurrently with the workshops, eight public participation hearings were

held throughout the state. Following the final public hearing, a preliminary summary of issues was distributed. Parties were invited to submit comments on the summary, and to propose suggested amendments to the existing underground rules.

On October 4, 2001, a Draft Decision was issued. Comments were filed on November 2, 2001; reply comments on November 16, 2001. On December 12, 2001, the Commission issued interim decision (D.) 01-12-009 (the Decision), which revises the rules governing the state's program to convert overhead electric and communications distribution and transmission lines to underground. The Decision expands Rule 20A criteria, extends the use of Rule 20A funds, allows cities to mortgage Rule 20A funds for five years, requires standardized reporting from the utilities, focuses on improving communication between utilities and residents, and orders the creation of an updated Undergrounding Planning Guide. In addition, the Decision identifies issues for a Phase 2 proceeding.

On January 10, 2002, the City of Oakland (Oakland) filed an application for rehearing of D.01-12-009, requesting rehearing "on the sole issue of whether Rule 20A definition of 'public interest' should be expanded to include areas of fire hazard and earthquake risk as factors to be considered in determining which streets are eligible for underground conversion." (Oakland Rhg. App. at 2.) On the same date, Oakland filed a Petition for Modification of Decision 01-12-009, asking the Commission to modify the interim opinion to adopt Oakland's language regarding the definition of "public interest," Finding of Fact #4 (as amended by Oakland) and Ordering Paragraph #2 of the Draft Decision.

On January 25, 2002, Pacific Bell (Pacific) and The Utility Reform Network (TURN) filed responses to Oakland's rehearing application. Pacific opposes Oakland's rehearing request because it fails to specify how the challenged decision is unlawful or erroneous. TURN opposes Oakland's rehearing application for several reasons, including the following: 1) the application is legally deficient for failure to identify specific error; 2) the application does not demonstrate any violation of AB 1149; and 3) the application does not identify any procedural due process error.

III. DISCUSSION

Oakland's rehearing application seeks an expansion of the definition of Rule 20A's definition of "public interest" so that the term permits Rule 20A funds to be provided for areas of fire hazard and earthquake. Oakland contends that by not amending Rule 20A to include fire hazard and earthquake, the Commission has failed to comply with AB 1149. (Oakland Rhg. App. at 4.) AB 1149 directs the Commission to study ways to amend, revise and improve rules governing the replacement of overhead electric and communications facilities with underground facilities. In addition, the Commission is directed to address at least four enumerated areas.¹ The statute states further that the Commission may revise the undergrounding rules without prior approval of the Legislature. (AB 1149, §1(b))

Oakland has neither identified specific legal error nor demonstrated that the Commission is otherwise in breach of AB 1149. The record shows that the Commission has addressed and is continuing to address in Phase 2 the areas set forth by the statute. The failure to cite legal error violates Public Utilities (PU) Code §1732 and Commission's Rules of Practice and Procedure (Rule) 86.1. Section 1732 provides in pertinent part that "[t]he application for a rehearing shall set forth specifically the ground or grounds on which the applicant considers the decision or order to be unlawful." Rule 86.1 mirrors the PU Code in providing as follows:

Applications for rehearing shall set forth specifically the grounds on which the applicant considers the order or decision of the Commission to be unlawful or erroneous. Applicants are cautioned that vague assertions as to the record or the law, without citation, may be accorded little attention. The purpose of an application for rehearing is to alert the Commission to an error, so that error may be corrected expeditiously by the Commission.

¹ The issues to be addressed include: 1) discovering and eliminating barriers to establishing continuity of the existing underground system and ways to eliminate uneven patches of overhead facilities; 2) how to enhance public safety; 3) how to improve reliability; and 4) how to provide more flexibility and control to local governments.

As noted above, the purpose of a rehearing is to make the Commission aware of legal error. (See *Carlson v. RR Commission* (1932) 216 Cal. 653, 655; *Abelleira v. Dist. Ct. of State of California* (1941) 17 Cal.2d 280, 302.) Oakland's rehearing application fails to meet this legal test. Not expanding the definition of "public interest" to Oakland's liking does not constitute legal error.

Moreover, Oakland's rehearing application is premature. This proceeding is ongoing. The Decision clearly stated that there would be two phases to this proceeding:

Because the study did not include any evidentiary hearings, the Commission proposes a two-phase strategy for improving the current undergrounding program. In this order we propose reforms that can be enacted based on the information already in the record of the proceedings. We reserve for phase 2, those actions or proposed changes that could benefit from evidence, testimony, and cross examination."
(D.01-12-009, *mimeo*, p. 19)

Accordingly, Finding of Fact No. 5 determined that "[t]he reforms set forth in this interim order are reforms that can be enacted based on the information already in the record of the proceedings." Since Phase 2 has not concluded, the Commission has not foreclosed further consideration of any relevant AB 1149 issues.

IV. CONCLUSION

The rehearing application filed by the City of Oakland failed to clearly identify or establish legal error, and was filed prior to the conclusion of Phase 2, where relevant AB 1149 matters continue to be addressed.

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Therefore, **IT IS ORDERED** that:

The rehearing of interim decision D.01-12-009 is denied.

This order is effective today.

Dated March 6, 2002 at San Francisco, California.

LORETTA M. LYNCH

President

HENRY M. DUQUE

RICHARD A. BILAS

CARL W. WOOD

GEOFFREY F. BROWN

Commissioners

Commissioner Richard A. Bilas
being necessarily absent, did not participate.